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In the Supreme Court

of the

United States of America

October Term, 1920

No. 372

THE FIRST NATIONAL BANK OF JASPER, FLORIDA.

Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME, GA.,

Respondent.

No. 372

BRIEF OF PETITIONER

WILLIAM WADE HAMPTON,
Gainesville, Florida.
Attorney for Petitioner.

H. S. HAMPTON and
SANFORD & HAMPTON,
on the Brief.

STATEMENT

The defendant, or respondent in error filed suit in the District Court of the United States for the Southern District of Florida upon certain certificates of deposit de-

scribed respectively in the eight counts of his declaration, issue by First National Bank of Jasper, to American Bank and Trust Company, Trustees, and afterwards endorsed to First National Bank of Rome, Georgia. (See trans. rec. pp. 2-6).

The defendant bank therein filed pleas, to each of the special counts (see trans. pp. 8-27 inclusive) setting up former proceedings, to-wit, three suits respectively by O. A. Worley, J. H. Corbett and A. R. McLeod to the above counts in the declaration respectively, and alleging in substance that in the said suits respectively in the Circuit Court of Hamilton County, Florida, the said last named court has decreed that the said certificates of deposit sued upon by the plaintiff herein were procured by fraud of the Rome Insurance Company, and its trustee, were impressed with a trust in favor of the complainants in the respective suits, and that the said certificates of deposit were decreed to be null and of no effect, and the fund in the said First National Bank of Jasper decreed to belong respectively to the complainants in said suit; that said decrees were of full force and effect, and attached to the plea in each case is a copy of the final decree of the Circuit Court for Hamilton County, Florida, which is made a part thereof, and in which is recited the several steps in the respective suits, preceding the final decree.

The respondent or defendant herein in error filed a demurrer to said additional pleas (pp. 27-28 trans.) and said demurrer coming on to be heard before the District Judge, same was overruled, his opinion being found on pages 29-32 of the transcript.

Thereafter the said respondent herein filed replication to the pleas to each count of the declaration in which it denies that the Circuit Court of Hamilton County acquired jurisdiction save by service by publication, and further denies that the plaintiff in error appeared in said suit, save

specially for the purpose of contesting the pretended service by publication attempted to be made upon it, and attached to the replication is a complete transcript of the record of the proceedings in the circuit court for Hamilton County, Florida, set forth in the pleas filed herein by the defendant (trans. pp. 33-74).

In the transcript of record, attached as exhibited to said special pleas, this Court will note (p. 58) an application to the Court for a supersedeas, which was granted (p. 59) also a supersedeas bond (pp. 60-61) and there is also attached (p. 70) a stipulation of counsel staying proceedings in the suit of J. A. Corbett and A. R. McLeod, and agreeing that the ultimate decision of an appeal in the case of *J. H. Corbett* vs. *Rome Insurance Company* shall be decisive of the validity of the service by publication on the said defendant in this case.

The petitioner herein by counsel filed motion to strike replication, and a demurrer thereto (pp. 74-76) and on July 5, 1915, respondent sought leave of the court to file additional grounds of demurrer which are shown on page 76 of the transcript—said motion was denied (p. 79).

On November 21, 1916, the respondent filed a petition for re-hearing of its demurrer to the petitioner's additional plea, said motion to withdraw replication and file additional grounds of demurrer, and petition for re-hearing coming on to be heard February 2, 1917, were overruled by the court (p. 79 of trans.)

The cause coming on to be heard on February 2, 1917, upon demurrers and motion to strike the replication filed by the respondent to said additional pleas, the demurrers and each of them were sustained (p. 79).

On January 8, 1919, the parties entered into an agreement (p. 80) withdrawing all please save additional pleas 1 to 4 set forth in the transcript (pages 1 to 5 inclusive).

The respondent having declined to plead further and petitioner in error moving for a final judgment, thereupon on January 9, 1919, the court entered a judgment in favor of the petitioner, and from that judgment the respondent sued out a writ of error to the Circuit Court of Appeals, Fifth Circuit (pp. 81-82) assigning a number of errors (pp. 84-86) various steps in perfecting appeal (pp. 87-92).

The Court of Appeals reversed the judgment of the District Court opinion (pp. 93-98).

ARGUMENT

For convenience we will argue the specifications of plaintiff in error as they appear in its brief.

Specifications of Errors 1 and 2

The Court will observe that the real controversy involved in this cause is an attempt on the part of the respondent to test the sufficiency of the jurisdiction of the Circuit Court for Hamilton County in the original proceeding, in which service by publication was had upon the respondent as defendant.

The Court will also observe that in the original suits in the Circuit Court for Hamilton County, Florida, the court assumed jurisdiction by reason of the existence of two facts which are undisputed:

(a) The *res* or fund sought to be impressed with a trust in favor of the complainants in the original suit was situate within the jurisdiction of the court, to-wit, in Hamilton County, Florida.

(b) Service by publication was had in the form prescribed by the statutes of Florida upon the plaintiff as co-defendant in said suit.

No attack has been made upon the sufficiency of the pleading wherein the special pleas set up *res judicata*,

save the position taken by the respondent in the pleading attacking the legality of service by publication, but the respondent relies in the lower court upon the ground that the original suits in equity in the Circuit Court of Hamilton County were in their nature suits in *personam*.

While we confidently believe, as will be shown hereafter in this brief, that the respondent has vested the Circuit Court of Hamilton County with jurisdiction of its person by appearance, we will assume, for the sake of argument, that its conduct has not amounted to an appearance in said court, and test the jurisdiction of the Court upon the record of constructive service.

The statutes of Florida provide certain requirements whereby constructive service may be had upon a non-resident defendant.

Section 1866 General Statutes of Florida.

By Chapter 5393, Act of 1905, the jurisdiction of chancery courts to enter decrees upon constructive service is extended to partition, for specific performance of a contract to convey or exchange real estate, or other suit in chancery, relating to or affecting the title to real estate.

Chapter 5393 Laws of Florida, 1905;

Chapter 5913 Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the Court is sought to be determined.

Pennoyer vs. *Neff*, 95 U. S., 714;
Loaiza vs. *Sup. Ct.*, 9 L. R. A., 377;
Boswell's Lessee vs. *Otis, et al.*, U. S., 13 Law Ed., p. 165;
Black on Judgments, Vol. 2, Sec. 793;
Gillon vs. *Wear*, 28 S. W., 1014;
Arndt vs. *Griggs*, 134 U. S., 316;
Hamilton vs. *Lewis*, 161 U. S., 256.

This Court will find a stipulation embodied in the record by respective counsel in the lower court that the decision of the Supreme Court of Florida in the case of *Rome Insurance Company* vs. *Corbett*, then pending shall be "decisive of the validity of the service by publication on the said defendant in this case" (see trans. p. 70).

We find by adverting to the decision that upon an appeal prosecuted by the respondent to the Supreme Court of Florida, attacking the validity of service by publication of this case, the decree of the Court and its assumption of jurisdiction has been upheld, holding "Our constructive service statute is broad enough to apply to any suit in equity pending in our circuits courts." The Court further holds "We are not to be understood as holding that the Court might not quash a service by publication if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge: the bill before us *does not* present that case."

Rome Insurance Co. vs. *Corbett*, 66 Fla., 438, 63 Sou. Rep., 833;

First National Bank vs. *Eastman*, 14, Calif., 487;

A. & E. Annotated Cases, Vol. 1, p. 626.

This brings us to a consideration of the question where service by publication is made in a cause under a valid State statute and is upheld by the Supreme Court of that state in a direct proceeding brought for that purpose: the decree in that proceeding appears in the record in this cause to be not a decree in *personam*, but a decree determining the *status* of a fund before the Court. That decree is now sought to be reviewed and set aside in a district court of the United States.

It appears upon the face of the record that the Circuit Court of Hamilton County, Florida, is a court of record,

and a court of general jurisdiction; therefore, we are entitled to not only the presumption of jurisdiction of the Court, but to the regularity of all proceedings precedent to its final decree.

Black on Judgments, Vol. 1, Sec. 270.

A judgment rendered by a State court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be collaterally impeached, or reviewed, or re-examined as touching the merits of the original controversy.

23 Cyc. p. 1596, and case cited under note B.

If the question is one of jurisdiction, and depends on some local law or statute, and is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

Hubbard vs. *American Investment* Co., 70 Fed., 808;
Sipe vs. *Coprell*, 59 Fed., 970;
Colt vs. *Colt*, 111 U. S., 556;
Duncan vs. *Gegan*, 25 Law. Ed. (U. S.) p. 875.

This Court has said in the case hereinafter cited, upon a state of facts similar to the case at bar, where jurisdiction was denied: "Having appeared for the purpose of challenging the jurisdiction of the Court, the decision of the Court upon that issue is conclusive until annulled, or reversed by some court having jurisdiction to revise and correct error. However erroneous the conclusions of the Jefferson Circuit Court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court or

this Court has any character of appellate or revisory jurisdiction over that Court."

Phelps vs. *Mutual Reserve Fund Assn.*, 142 Fed., 458.

In the absence of a Federal question, the decision of a State Court upon the determination of its jurisdiction, involving the construction of a statute of that state, is binding and conclusive upon the Federal Court.

Terry vs. *Davis*, 107 Fed., 50;
Fallbrook Irrigation District vs. *Bradley* (U. S.) 11 Law Ed., 369;
See also 101 U. S., 551, and 97 Fed., 525.

That the instant case is a collateral attack of the State Court judgment, see

Supervisors vs. *U. S.*, 4 Wall, 435;
Harris vs. *Hardeman*, 14 How., 334.

We have previously adverted to the fact that the record in this case discloses by exhibit attached to the special pleas, as well as the special replication, after the decision of the Supreme Court of Florida, in the case of *Rome Insurance Company* vs. *Corbett*, 66 Fla., 438, that the Circuit Court for Hamilton County, Florida, pursuant to the mandate of the Florida Supreme Court, has proceeded to a final decree, which is in its nature a decree in *rem* in that no personal liability is attempted to be fixed against the respondent, but the funds in the custody of the court are impressed with a trust in favor of the complainant in the lower court, and the *decree* is *confined* to the *property alone*. This decree has never been reversed nor has the respondent prosecuted an appeal therefrom to the Supreme Court of Florida, therefore, it cannot now be collaterally attacked.

Central Trust Co. vs. *Seasongood*, 130 U. S., 32 Law Ed., 130.

But the learned counsel for the respondent urge that "Equity acts in *personam*," and that the instant case lacking as it does the essentials of an action in *rem* strictly considered, is in its effect, merely a determination of the personal rights and obligations of the respondent; therefore, it cannot be made the basis of a decree in *rem* upon constructive service.

While this view may be technically a correct one, the learned counsel in arriving at their conclusions have evidently ignored a large class of cases which are not strictly actions in *rem*, but are frequently spoken of as actions *quasi* in *rem*, in which the sole purpose is not a decree in *personam*, but to determine the *status* of a *specific* property or *thing*, and the decree in such a case is confined to and operates only upon the thing itself. We know of no better illustration than is embodied in a leading decision of the highest court of our land, in which a definition of this class of cases is given:

> "Actions in *rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and—except in cases arising during war for its hostile character—its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.
>
> "There is, however, a large class of cases which are not strictly actions in *rem*, but are frequently spoken of as actions *quasi* in *rem*, because, though brought against persons, they seek only to subject certain *property* of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the

State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant, to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in *rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to the payment of demands against them of its own citizens."

Freeman vs. *Alderson*, 119 U. S., 373;
Black on Judgments, 2 Ed., Vol. 2, Sec. 793.

"Has the State any power through the Legislature and the Courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State, or to the Courts of the State, and where the most urgent public policy and *justice* requires that the State and its Courts should assume jurisdiction over such property?"

This question is affirmatively answered by the Supreme Court of the United States in the case of *Arndt* vs. *Griggs*, 33 Law Ed., 921: in that decisioon the Court says:

"All things within the territorial boundary of a sovereignty are within its jurisdiction, and generally within its own boundary its sovereignty is supreme."

In an able decision in the United States Circuit Court in the District of Minnesota, by that eminent Judge Shiras, he discusses this question and analyzes all the decisions touching this subject by the Federal Courts; in this decision he calls attention to the fact that by the Act of Congress, the Federal Courts are likewise vested with power upon constructive service to take jurisdiction of

proceedings to settle adverse claims to realty, or to remove a cloud from the title thereof, and render a decree which shall bar the claim of an absent defendant served only by publication, and he differentiates the ordinary power of a court of chancery which acts in *personam* from that of the power vested by a State statute, and among other things, says:

> "In the absence of statutory authority for the bringing of an action to quiet title, if a claimant invokes the aid of a court of equity to settle the adverse claims made by another, he puts in motion the ordinary equitable powers of the court which are exercised in *personam* * * * in which case the personal service upon the defendant within the limits of the jurisdiction of the court is essential to confer jurisdiction upon the court. In case, however, the State has by statute provided for the title to realty within its borders by proceedings for the quieting of title to a particular tract of land, and has provided that in case an adverse claimant is a non-resident, service by publication may be made, then the court is not proceeding under its *ordinary equitable* power with the limitations pertaining thereto, but is proceeding under the power and rights conferred by the Statute."

Bennett vs. *Fenton*, 10 L. R. A., 500;
Hamilton vs. *Lewis*, 151 U. S., 256;
Gillon vs. *Wear*, 28 S. W., 1014;
Hardy vs. *Beatty*, 19 S. W., 778;
Palmer vs. *McCormick*, 30 Fed., 82;
Purdy vs. *Wallace*, 81 Fed., 515;
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the District Court was clearly upon the conclusion of the Court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by

reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this Court in:

> *C. R. I. & P. I. R. R.* vs. *Sturm*, 174 U. S., 810;
> See also *Rood on Garnishment*, Sec. 245;
> *Havey* vs. *Great Northern R. R.*, 52 N. W., 905;
> *Shinn on Attachment and Garnishment*, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, *e. g.*, while decree protects the successful party so long as he is within the limits of the State, is no protection anywhere else.

> See *Green* vs. *Van Buskirk*, 5 Wall, 307;
> *Wharton's Conflict of Laws*, 3d Ed., Vol. 1, Sec. 38 *et seq.*

This doctrine is well illustrated in the leading case of *Loaiza* vs. *Sup. Ct.*, 9 L. R. A., 377, wherein the court says:

> "It (the State Court) cannot bring the person of a non-resident within its limits, its process goes not beyond its borders, but it may determine the extent of his title to real estate held within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice."

If the State Court has such power with reference to real estate held by a non-resident, how much more will it have the same power with reference to *personal property* situate within its jurisdiction?

Loaiza vs. *Sup. Ct.*, 9 L. R. A., 377.

The same principle is sustained in the case of *Heidriter* vs. *Elizabeth Oilcloth Company*, 112 U. S., 301, wherein the court says that "Jurisdiction may be acquired by the mere bringing of a suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction, that may be equivalent to a seizure, being the open and public exercise over it for the purpose of a suit."

In conclusion, it appearing that the Supreme Court of Florida construed a statute of that State in the case of *Rome Insurance Company* vs. *Corbett*, *supra*, having held that in the instant case,

(a) The complainant in the Circuit Court for Hamilton County has complied with all the requirements of a statute authorizing process by publication upon the non-resident defendant;

(b) The statute under which the suit was filed and publication issued, was broad enough to cover the case at bar, and

(c) The proceeding was not a suit in *personam* but one in which a decree confining and limiting its operation to the *res* or fund before the Court would be upheld;

We respectfully submit that in the light of the authorities *supra*, the decision of the Florida Supreme Court is binding and conclusive upon this honorable Court.

III.

Specifications of Errors No. 3

We come now to the question of whether or not the respondent has entered its appearance so as to give jurisdiction to the Circuit Court for Hamilton County in the original proceeding. We are not unmindful of the fact that if this were a question wherein jurisdiction of

the person alone was involved, that the plaintiff in error might not be held to have waived his right to object to the jurisdiction of the Court by appearing in the Court of original jurisdiction, but no such question is here involved: we are simply concerned with the construction of a State statute, of property, and of a cause of which the State Court had original jurisdiction, and the rules of practice and statutes governing that Court will be observed and followed by a Federal Court.

It appears by the transcript of the record in this cause that although the respondent as defendant in the Court of original jurisdiction, filed a special appearance denying jurisdiction, he confined his appearance to the question of the right to service by publication alone, and after this question had been decided adversely to it, an appeal was prosecuted to the Supreme Court of the State of Florida.

See

Rome Insurance Company vs. *Corbett*, 66 Fla., 438.

That taking an appeal from a decree is an appearance so as to confer jurisdiction upon the person of the defendant has been repeatedly adjudicated by the Supreme Court of Florida.

Drew Lbr. Co. vs. *Walter*, 45 Fla., 252; 34 Sou. Rep. 244;
Barwick vs. *Rouse*, 43 Sou. Rep. 753;
Hayman vs. *Weil*, 44 Sou. Rep., 176;
Rumeli vs. *City of Tampa*, 48 Fla., 112; 37 Sou. Rep. 563.

An Appeal Operates as an Appearance:

In the case of *Stovall* vs. *Stovall*, 39 S. W., 416, the Court said:

> "The rule is established, that notwithstanding jurisdiction of the person can be acquired only by actual service or by a voluntary appearance, if a

defendant appears and raises the question of jurisdiction over him by showing that no process has been served on him, if the court agrees with him and sustains his motion he is not before the court, but if the court holds against him and on appeal reverses the lower court, then he is before the court by reason of such appeal, and the court has acquired jurisdiction."

The same rule is applicable in the case of a party prosecuting a writ of error, citing,

Taylor vs. *Sledge*, 110 Tenn., 263;
Wilson vs. *Brandenburg*, 16 Ark., 646;
Wylly vs. *Sanford L. & T. Co.*, 44 Fla., 818; 33 Sou. 453.

In the case of *Taylor* vs. *Sledge*, above cited, where the Court of Tenn. says:

"He," referring to the plaintiff in error in that case, "had two remedies to correct any error committed against him. If there was error in the fact of the record, he could have the judgment reversed upon writ of error from this court. If there was no jurisdiction of his person, the judgment was absolutely void and he could have had it so decreed, and its collection enjoined, by proper proceedings in the Chancery court. It was his right and his duty to chose between the two remedies. He could not have both, because a party is entitled to only one trial in court; the policy of the law being to prevent multiplicity of suits and to put an end to litigation. It is immaterial that the two remedies are not equally broad as the defendant is not bound to adopt the one that is less effectual, etc. It is accordingly held, in harmony with the reported cases, that where an appeal is taken for the purpose of obtaining a trial *denovo* in the appellate court the appellant submits himself to the jurisdiction of that court, and can not take advantage of any irregularity in the service of the original summons."

We find that there are 22 States which hold that an appeal operates as a general appearance and among these

is the Supreme Court of the State of Florida where we have no statute holding that a special appeal may be taken.

The leading case in Florida, or we might say, the case that is parallel with the one at bar is the case of *Wylly* vs. *Sanford Loan & Trust Co.*, above cited, wherein the Supreme Court of Florida says: (Second head note) "An appeal to this court operates as an appearance in the cause, which will permit the court below, after reversal, to proceed with the case."

Opinion by Maxwell, *J.*:

> "This cause was referred by the court to its late commissioner, who reported it for reversal.
>
> "A bill for foreclosure of mortgage was filed by appellee (complainant below) against appellants, and service of process upon defendants, attempted by publication. Decree *pro confesso* was entered against defendants, followed by a final decree of foreclosure. From this decree, defendants, who had not appeared in the court below, appealed to this Court, assigning as error various alleged irregularities in the service of process upon them by publication.
>
> "In order that the court should acquire jurisdiction of non-resident defendants by constructive service of process by publication, it is necessary that the provisions of the statute authorizing such service be strictly and accurately pursued. *Shrader* vs. *Shrader*, 36 Fla., 502.
>
> "One of the requirements of our statute is that the Clerk 'shall also within twenty days of the making of the order' for publication 'send by mail a copy to the defendant, if his residence be shown by the bill or affidavit.' Rev. Statutes 4, 1113, 2. Chap. 4129, Acts 1893.
>
> "In this case there were two defendants, both non-residents, and the certificate of the Clerk filed, as required by Sec. 1145 Rev. Statutes, is that he 'mailed copies of said order to the address of defendant as given in the affidavit of complaint.' This shows at best service upon one only of the defendants, and the

uncertainty upon which of them such service was made renders it *primafacie* void as to both (several cases cited). The decree of the court below, therefore was rendered against parties of whom the court is not shown to have acquired jurisdiction, and must be set aside.

"The appeal of the defendants operated as an appearance in the cause, however, which will enable the court below now to proceed in the matter. *Stanley* vs. *Arrow* and *Finlason* vs. *Lipscomb*, *supra*.

"The decree is reversed and the cause remanded with directions to vacate the decree *proconfesso* heretofore entered against the defendants, and for further proceedings in accordance with law."

An examination of the decisions of other jurisdictions will show wherever this question has been presented and decided in a well considered case, a like conclusion has been reached by the Court, e. g., in the case of *Tootle* vs. *McClellan*, 103 S. W., 766, plaintiff brought an action in the United States Circuit Court for the Northern District of Indian Territory, upon a judgment obtained in a State Court of Missouri. In the State Court McClellan appeared specially to quash service of summons as fraudulent on the ground that he was not properly within the jurisdiction of the court; the State Court heard the application and denied it. McClellan, however, did not appear or plead, whereupon the Missouri State Court granted judgment against him by default. It was held by the United States Circuit Court that the defendant could not dispute the validity of the judgment inasmuch as the precise question he tried to raise in the United States Circuit Court had been submitted to and determined by the State tribunal.

The facts in this case are identical with the case at bar, and the defendants in the District Court raised the question by a plea of *res judicata*, the averments of which were not challenged by the plaintiff, but the precise question

previously adjudicated in the State court was sought to be raised in the form of a replication to the plea.

Again, in the case of *Capwell* vs. *Sipe*, 51 Fed. Rep., 667, plaintiff sued on a judgment rendered in Rhode Island. The defense was that the defendants had been personally served in Rhode Island while they were there for the sole purpose of attending trial of another suit. They pleaded this fact in abatement but the State Court overruled the plea. It was held that the decision of the Rhode Island Court on this question was conclusive. This case was affirmed in 59 Fed., 970.

In *Kellogg* vs. *Maloney*, 152 Federal, 405, plaintiff brought ejectment in the Circuit Court of the United States. An action had been previously brought in the State Court to foreclose a tax lien. The defendant in the foreclosure suit appeared specially just as the plaintiff in error did in the instant case, to quash the summons, which motion was denied by the State Court. He failed to plead and judgment by default was entered. He then brought the same action in the United States Circuit Court against Maloney, who held title under a deed from the purchaser at the foreclosure sale. In affirming the Circuit Court, the Federal Circuit Court of Appeals decided adversely to Kellogg, holding "that the plaintiff in error cannot again litigate the same question in any court is clear."

In *Hubbard* vs. *American Investment Company*, 70 Fed., 808, plaintiff brought his action on a judgment in the District Court of Colorado. In the State Court action the defendant had entered a special appearance and moved to quash the proceeding on the ground that there was no legal service upon him. The State Court heard his motion and denied it; judgment was then entered in the State Court against him, and the present action on said judgment was brought in the U. S. Circuit Court. The Court in excluding testimony offered by the defendant to show that

the person served with summons was not his agent, held: "the question of jurisdiction has been once heard and determined, and this Court cannot sit as an appellate tribunal to determine the correctness of the Colorado Court upon this case."

See also to the same effect.

Ferguson vs. *Crawford*, 70 N. Y., 254;
Plant vs. *Harrison*, 36 Misc., 249;
Bailey vs. *Wilson*, 52 Misc., 642;
Anæman vs. *Dueker*, 25 Pac., 582.

We have read with interest the argument of counsel for plaintiff in error that the Florida Court in its decisions touching this question proceeded upon the theory that in every adjudicated case there has been a voluntary appearance, and stress is laid by counsel upon this point. We must confess that we see no reason for such a construction; in particular as the facts of the adjudicated cases will show that in every case the litigant in appealing to the Supreme Court of Florida has sought to avoid its assumption of jurisdiction over his person in the same manner as the plaintiff in error has done in the instant case.

As previously stated in this brief, there is nothing in the record to show that the action of the respondent in applying for relief against an alleged unauthorized intervention, and having thereby invited the decision of the Florida Court upon the merits of his application, did so involuntarily, because if his contention be correct, the action of the Florida court was a nullity and he was not bound to appear therein.

Having invited the decision of the Court in this manner, he is bound by its adverse decision to him. He cannot inject the same issues into an action brought in the United States District Court for the perfectly obvious reason that that Court cannot act as an appellate court to review the decision of the Florida Court.

Again, respondent seeks to justify its action in appealing by designating its action as a special appeal.

Upon reading the statute of Florida giving the right to appeal both as to final and interlocutory decrees, it is apparent that there is no provision of law in this State authorizing a special appeal. The sole case to which our attention has been called specifically authorizing what is termed a "special appeal" is the case of *Freer* vs. *White*, 51 N. W., 807, cited on page 49 of the brief of plaintiff in error. We have examined this decisioon, and have also examined the law with reference to the special appeal referred to, and we find that this form of appeal is authorized by a statute in the State of Michigan, to-wit, Section 5432, Compiled Laws. An examination of the reported case of *Rome Insurance Company* vs. *Corbett*, 63 Sou. Rep., 834, will also disclose that the Supreme Court of Florida denies the existence of the right to special appeal of the character urged by the plaintiff in error.

Rome Ins. Co. vs. *Corbett*, 63 Sou. Rep., 834.

Further than this, we find the plaintiff in error in the State Court procuring a stay of proceedings, and we find no authority for his contention that having appeared and filed a stipulation in the lower court, procuring thereby an advantage, such action is not an appearance (see par. 4 final decree R., page 14).

It is true, it attempts to limit the stipulation by reciting therein that it shall not be construed as a voluntary appearance, but our concern is not what the plantiff in error might have intended, but with the legal effect of its act. That obtaining such a benefit is an appearance.

See

Insurance Company vs. *Swineford*, 28 Wis., 257.

A special appearance cannot be made in the appellate court.

Gage vs. *Merryatt*, 23 Pac., 337.

The foregoing is substantially the brief presented by counsel for petitioner in the Circuit Court of Appeals. We desire to add a few observations in support of the petition, which we deem proper by reason of the language of honorable Circuit Court of Appeals in its judgment.

A reference to the decision of the Circuit Court of Appeals, (trans. p. 94, Sec. 138) will show that the following language is employed, to-wit:

> "The Circuit Court of Hamilton County proceeds to final decree in the case of *Corbett* vs. *First National Bank of Jasper, et al.*, upon the theory that there *was a res* in which the non-residents were interested, in the *control* of the *court*, and the Supreme Court of Florida on appeal took the *same view* and sustained the constructive service upon the non-residents upon that idea."

We are unable to conceive of a more clear and unambiguous admission that the court of original jurisdiction—the Circuit Court of Florida—by its decree determined there *was a res* within its jurisdiction upon which by valid constructive service it acquired jurisdiction of the subject matter and person of the defendant for the purpose of determining the status of the *res*, and that the highest court of the State of Florida, having by its decree taken the same view, and made the same finding, the case comes within the well established principle of law that the decision of the highest court of a State becomes the law of that State, and the lower courts of that State must follow such decision.

There was, therefore, nothing left for the Circuit Court of Hamilton County to do but to accept the mandate of

the tribunal of final appellate jurisdiction as the law of that State, and proceed to final decree.

Now when the honorable Circuit Court of Appeals in the decision quoted *supra* finds that it was upon the theory that there was a *res* in the jurisdiction that the two Florida courts acted, and then further determines that the Supreme Court of Florida was wrong in its conclusions, we respectfully submit that the decision of the said Circuit Court of Appeals in its last analysis is nothing less than a reversal of the Supreme court of Florida.

"If the question is one of jurisdiction and depends on some local law or statute, and is presented to and decided by the court rendering the judgment, such decision is binding on the Federal courts."

Hubbard vs. *American Inv. Co.*, 59 Fed., 970;
Colt vs. *Colt*, 11 U. S., 556;
Duncan vs. Gegan, 25 Law Ed. U. S., 875;
Phelps vs. *Mutual Reserve Fund Assn.*, 142 Fed., 458.

It appears that when the Act of Congress proposing the creation of the Circuit Court of Appeals was presented, and during the debate thereon, it was suggested with much vigor by opponents of the measure that just such cases as the instant case would arise wherein the Circuit Court of Appeals would assume jurisdiction, which in effect would amount to appellate jurisdiction over the State tribunals.

That this case is a most important one, not only to the litigants involved, but as a precednt in future litigations, is manifest when we consider:

1. The Circuit Court of Appeals by its decree determines that a certain certificate of deposit held by the First National Bank of Jasper, Florida, is a valid evidence of indebtedness, although the Circuit Court of Hamilton County, a court of general jurisdiction, pursuant to

a mandate of the Florida Supreme Court in the Corbett case, *supra*, has proceeded to final decree and found as a fact,

"It is of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank and Trust Company (p. 23 trans.) and petitioner is enjoined from paying the proceeds of the same," and that final decree of said Circuit Court of Hamilton County, Florida, has never been appealed from by the respondent, although according to the finding of the Florida court, the respondent was before the court as an actor, submitted to its jurisdictioon.

The said Circuit Court of Appeals further in its decision erroneously assumes that the plea of *res judicata* filed by petitioner in the lower court and against which no attack was made as to its sufficiency by respondent is not in bar of the right of respondent to try out in the common law action the personal liability of the bank that issued the certificate.

We do not deem it necessary to cite authorities in reference to this proposition because in our opinion the decision is erroneous in that it attempts to give vitality to and permit the respondent to come into a common law court with a cause of action, to-wit, the same certificate of deposit found by the court of Hamilton County and affirmed by the Supreme Court of Florida as being a *res* within the jurisdiction of the court when this same cause of action had been previously adjudicated by the court having jurisdiction of the parties and subject matter to be a nullity and obtained through fruad.

In conclusion, we deem it proper only at this time to call the attention of this honorable Court to the fact that there were four cases pending in the Circuit Court of Appeals, two of which by order and decree of this honor-

able Court, as communicated to us, by the clerk thereof, have been consolidated and one record permitted to be used for both cases. The two cases are numbered 371 and 372, respectively, and a stipulation that the judgment of this honorable Court in case No. 372 be also entered in No. 371 has been duly filed.

The other two cases referred to are represented by Mr. Frank Fleming, Nos. 271 and 272.

We respecfully submit that in view of the law herein stated the decision of the honorable Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM WADE HAMPTON,

Attorney for Petitioner.

H. S. HAMPTON and SANDFORD & HAMPTON,

on the Brief.

FILED
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WM. R. STANS
CL

In The Supreme Court of the United States

October Term 1921

No. 77

THE BANK OF JASPER, a Corporation,
Petitioner,

VERSUS

THE STATE BANK OF ROME, GEORGIA,
a Corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

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In the Supreme Court of the United States

October Term 1921

No. 77

THE BANK OF JASPER, a corporation,
Petitioner,
vs.
THE STATE BANK OF ROME, GEORGIA, a corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, which was the original plaintiff, instituted this suit against the Petitioner, which was the original defendant, in the United States District Court for the Southern District of Florida, on the 27th day of January, 1913, on two certificates of deposit (numbered 320 and 321) (Transcript, pp.

3-6) alleged to have been issued by Petitioner to the American Bank and Trust Company, Trustee, and subsequently endorsed to it individually. After the institution of this suit the name of the American Bank and Trust Company was changed to the State Bank of Rome, which is the respondent here (Transcript, p. 61). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript, p. 3). A judgment was entered in the said District Court in favor of the Petitioner on the 9th day of January, 1919. (Transcript, p. 62). From said judgment said Respondent sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court on the 10th day of March, 1920, reversed the judgment of the said District Court. From said judgment of said Circuit Court of Appeals, Petitioner sued out a Petition for Writ of Certiorari to this Honorable Court, which was granted on the 15th day of October, A. D. 1920.

Prior to the institution of this action in the United States District Court as aforesaid, on to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by W. S. Murrow and G. R. Brown, in separate suits, against Rome Insurance Company, American Bank and Trust Company, original plaintiff in this suit, and against your petitioner (Transcript, pp. 7-10), praying that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void; that the contracts of sale of certain stock by

reason of which said certificates were issued be decreed null and void and certain notes given by complainants to petitioner pursuant thereto, and the basis of said certificates, be cancelled and surrendered (Transcript, pp. 9 to 15).

It was alleged in said bill of complaint that the said certificates of deposit were issued by the respondent based on certain notes issued by the complainants to the order of petitioner pursuant to a contract of sale of stock of the Rome Insurance Company; that said contract was fraudulent; and that the proceeds of said notes remained in the hands of petitioner (Transcript, pp. 8, 9).

In said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon American Bank and Trust Company, (the original plaintiff herein) by publication under the provisions of Section 1866 General Statutes of Florida, Section 3111, Revised General Statutes of Florida (year 1920) (Transcript, pp. 11, 14, 32). Your petitioner, a resident of the State of Florida, was personally served with process.

Upon the return day fixed in this order of publication American Bank and Trust Company (original plaintiff here) filed special appearances and motions to quash the service (Transcript, pp. 23, 24, 55 and 56), which motions were in substance confined to the one ground that the proceedings brought in the State Court were actions in personam and that there had been no personal service on said American Bank and Trust Company. These motions having come on to be heard before the Circuit Court of

Hamilton County, Florida, said Court on the 14th day of March, and the 3rd day of April, 1913, denied similar motions in a companion case, B. F. Carter vs. Rome Insurance Company, (Transcript, pp. 35 and 42).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State Courts, (Transcript, pp. 25, 57) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als, which appeal was from said orders of the State Court denying similar motions to quash service by publication on similar grounds, and it was further provided in and by said stipulations that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendant in those suits, and if the service in the said Carter case be ultimately held defective and ordered quashed then the service in the other cases shall be held defective and shall be quashed.

The Circuit Court of Appeals in its decision, (Transcript, p. 72) stated that there was a stipulation in the State Court, meaning the State Trial Court, that the supersedeas should not constitute a general appearance. There is no basis for such statement, nor are there any facts in the case from which such a statement is inferable. All that the stipulation provided for was that the *notice* of ap-

plication for an order granting and fixing the terms of a supersedeas by the State Trial Court, should not operate as a general appearance (Transcript, p. 45). There is no stipulation directly or inferentially providing that either the supersedeas or appeal should not operate as a general appearance.

The other stipulation entered into in the State Trial Court, in each of the said chancery suits brought by said W. S. Murrow and G. R. Brown, respectively, (Transcript, pp. 55 and 57) providing for a stay of proceedings in those suits, pending appeal in the case brought by said B. F. Carter and making the issue of service in such cases dependent upon the decision of the B. F. Carter case, provide only that the stipulation as such shall not constitute a general appearance. Petitioner has never contended that such stipulation was a general appearance, but only that the appeal constituted the general appearance. The effect of such appeal was never avoided or attempted to be avoided by stipulation.

At the June term, 1913, of the Supreme Court of Florida, that Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company, et als., which decision is set forth in full (Transcript, p. 52). The service by publication was not held defective and was not quashed.

The decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als., vs. J. H. Corbett, a companion case, on the authority of which, said case of Rome Insurance Company, et

als., vs. B. F. Carter was decided, is set forth in full (Transcript, pp. 53 and 54).

Thereafter, American Bank and Trust Company took no further part in the proceedings in the State Court, and on the 14th day of July, 1914, final decrees were entered in the State Court (Transcript, pp. 11 to 17), which decrees adjudged that the certificates of deposit therein mentioned, (being the same certificates of deposit herein sued upon) were void and of no effect and enjoined your petitioner from paying the proceeds of said notes to American Bank and Trust Company, or to anyone for it.

Following the decrees of the Circuit Court of Hamilton County, Florida, your petitioner filed pleas of res adjudicata, (Transcript, pp. 7 to 10) in this suit setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas, (Transcript, pp. 11 to 17).

To these additional pleas the plaintiff in the trial court (the respondent here), filed a demurrer (Transcript, p. 17), which demurrer was overruled (Transcript, p. 19). Thereupon respondent filed replications to said pleas, (Transcript, pp. 21 to 57), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas (Transcript, pp. 7 to 17), were actions in personam; that no personal service was ever had

on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person. There were attached to said replications a copy of the record in the said chancery suit of B. F. Carter vs. Rome Insurance Company (Transcript, pp. 26 to 54).

Petitioner filed a motion to strike (Transcript, p. 58) and a demurrer, (Transcript, pp. 58 and 59) to said replications, which demurrer was sustained, (Transcript, p. 60).

Thereupon, upon respondent's withdrawing all its pleas except the additional pleas setting up res adjudicata plaintiff in the trial court (the respondent here) filed a declination to plead further (Transcript, pp. 60 and 61), and final judgment was entered in favor of your petitioner, (Transcript, p. 62).

From said judgment, said plaintiff (the respondent here) sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, 1920, reversed the judgment of the District Court, (Transcript, pp. 70 to 77) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida acquired no jurisdiction over

the fund or res sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said Court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecutions of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida.

SPECIFICATIONS OF ERROR

First: Your petitioner represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous in this: it presents a conflict of State and Federal jurisdiction and in effect reverses the decision of the Supreme Court of the State of Florida in the case of Rome Insurance Company, et als., vs. B. F. Carter (63 Sou. 834; Transcript, p. 52) and Rome Insurance Company et als., vs. J. H. Corbett (63 Sou. 833; Transcript, pp. 53 and 54) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecution of the appeals in the State Court did not amount to general appearances, whereas, The Florida Supreme Court, following the established rule of practice in that State,

held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service by publication upon the respondent, American Bank and Trust Company, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the Court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court. The Circuit Court of Appeals held the contrary.

Second: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its situs in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The situs of a debt for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your

petitioner in the District Court, were proceedings in rem, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over American Bank and Trust Company (the respondent here) such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon (Transcript, pp. 11 to 17) declared the certificates of deposit herein sued upon to be void and of no effect.

Third. Your petitioner further represents that no question was raised by the plaintiff, (the respondent here) either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of res adjudicata, except that the proceedings in the State Court were actions in personam and that no personal service was had on the plaintiff (the respondent here) one of the defendants in those proceedings. The Court of Appeals committed an error in considering and passing upon questions not raised in the trial court and not called directly to its attention.

Fourth. Your petitioner further represents that the said United States Court of Appeals for the Fifth Circuit, committed error in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that State and thereby assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

ARGUMENT

The petitioner in its argument expects to establish the following:

A. Federal Courts must recognize and apply rules of the State Courts concerning matters of procedure.

B. In Florida, the prosecution of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings in rem, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the lex fori.

In York vs. Texas, 137 U. S., 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and the supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant in to court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

Missouri etc. Ry. vs. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. vs. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman vs. Wooters, 138 U. S., 287; 34 L. Ed. 962.

McLaughlin Brothers vs. Hollowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. vs. Rupp, 235 U. S. 261; 59 L. Ed. 220.

In the last case cited it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty,

or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceedings as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. vs. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

"It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the State of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under Section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677) to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another State. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

On page 31 of respondent's brief in opposition to application for certiorari (filed October Term,

1920) is cited the case of Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237, as authority for the proposition that "Illegality in a proceeding by which jurisdiction is obtained is not waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

The case cited has no bearing on the points involved here. Petitioner is not arguing that the mere appearance for the purpose of objecting to the court's jurisdiction amounts to a general appearance. Our position is that the prosecution of the appeal amounted to such a participation in the proceedings as to amount to a general appearance.

Furthermore, the Harkness case does not touch upon the rule laid down in York vs. Texas, 137 U. S. 15, 34 L. Ed. 604, which admitted that the rule in the Federal Court was as stated in the Harkness case, but held that where the State Supreme Court had held certain acts to constitute a general appearance, the Federal Courts were bound to follow the rules of the State courts.

None of the cases cited in respondent's said brief (filed October Term, 1920) meet this proposition. We later cite cases in this brief to show that in Florida the undoubted rule is that an appeal amounts to a general appearance. This being a matter of procedure, the Federal courts must apply the same rule.

For the above reason, the following cases cited by respondent in its said brief at pages 20, 30 and 31, respectively, are absolutely not in point:

Davis vs. C. C. C. & St. L. R. Co., 217 U. S., 157, 54 L. Ed. 708.

Pugh vs. Loisel, 219 Fed. 417 (5th Cir. C. C. A.)

Smith vs. Gov. of Canal Zone, 249 Fed. 273, (5th Cir. C. C. A.)

In the matter of Indiana Transp. Co. 244 U. S. 456; 61 L. Ed. 1253.

All the Federal cases cited by respondent are cases in which the question of jurisdiction arose in the lower Federal Court. York vs. Texas, 137 U. S. 15, 34 1 Ed. 604, holds that regardless of the rule in Federal Courts, a rule of practice in a State Court will be followed by the Federal Court, as the State has full power over procedure in its courts, and further holds that a rule that a qualified appearance is a waiver of defects in jurisdiction is not a denial of due process of law.

B—IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Tunno and Jessup & Co. vs. Robert, 16 Fla. 738.

Standley vs. Arnow, 13 Fla., 361.

Henry vs. Spitler, 67 Fla., 146, 64 So. 745.

Busard vs. Hutson, 65 Fla., 479, 62 So. 483.

Parnick vs. Rouse, 53 Fla., 643, 43 So. 753.

Hayman vs. Neil, 53 Fla., 127, 44 So. 176.

Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563.

Wylly vs. Sanford, L & T Co., 44 Fla., 818, 33 So. 453.

Schrader vs. Schrader, 36 Fla., 502.

Rome Ins. Co. vs. Corbett, Transcript herein, p. 82.

The Circuit Court of Appeals in its decision (Transcript, p. 74) stated that "The rule in Florida, differing from that which obtains in the Federal courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. The Florida Courts have always used the word "appeal" and have not limited it to the character of the appeal. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals.

In the case of Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563, it appeared that the error complained of was an interlocutory order, that of the entry of a decree pro confesso. The Supreme Court of Florida reversed the final decree on the ground that the entry of decree pro confesso was erroneous because the Court did not have jurisdiction of the defendant but held that by the appeal the defendant was then in

Court. The sole contest was whether the Court had jurisdiction of the defendant, not on the merits, and it would be idle mockery to say to the defendant, you appealed from the final decree entered on a void decree pro confesso, assigning as error the entry of the interlocutory decree pro confesso and you are therefore in Court, but had you appealed from the decree pro confesso your appeal would not have constituted an appearance. The Court makes no such distinction.

In the case of Tunno and Jessup & Co. vs. Robert 16 Fla., 738, two appeals were presented by the appellants named from several interlocutory decrees and a final decree. There was no final decree against M. K. Jessup & Co. The Supreme Court of Florida **at page 750 of text said:**

> "We next treat the appeal of M. K. Jessup & Co. There is no decree in this record against these parties signed by the judge. There is an entry in the record ordering the bill to be taken for confessed signed by plaintiff's attorney. Anterior to this there is an affidavit by plaintiff's attorneys, that M. K. Jessup & Co. reside in New York, as shown by the return of the Sheriff, that they are not to be found in the county, and a suggestion that they reside in New York, and there is an order of publication by the judge. There is no evidence 'by affidavit to the judge' that any publication was ever made of this order. This is a requirement of the statute in order to perfect a constructive service in such cases, and it must appear in the record; nor is there any authority in such cases for an order taking the bill *pro confesso* to be

> entered by the plaintiff's attorney. It must be granted by the judge, (Thomp. Dig. 452). The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167.
>
> "The decrees of the 21st day of February A. D. 1877, and of the 16th day of July 1877, and the order taking the bill as confessed against M. K. Jessup & Co. are reversed and set aside, and the case is remanded for further proceedings conformable to law and not inconsistent with this opinion."

In the above case in the appeal of M. K. Jessup & Co., there is no decree in the record against these parties signed by the judge; there is no showing of proper service by publication on said parties; there is no order by the judge taking the bill pro confesso against said parties; there is no showing of any final decree or proper interlocutory decree against said parties. Yet the Florida Supreme Court in its opinion holds: (Ibid text 151)

> "The persons composing the firm of M. K. Jessup & Co. having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process."

In view of the facts in the above case and the opinion of the Supreme Court therein, such opinion

clearly indicates that the prosecution of all classes of appeals to the Florida Supreme Court constitute general appearances on the return of the cause to the court from which it was appealed.

In the case of Standley vs. Arnow, 13 Fla., 386, it appeared that the defendant had moved in the lower court to set aside the report of the master for want of notice of the hearing before him, and also to set aside the order Pro Confesso on the ground that she had a meritorious defense, and because no subpœna in said cause had been served upon her, which motion was overruled by the Court.

The Supreme Court of Florida held that the lower Court did not have jurisdiction of the defendant to enter a decree, and reversed the orders and decrees entered in the lower Court, but held:

> "The decree of the Circuit Court, and all other orders and proceedings therein subsequent to the return of the subpœna, must therefore be reversed, with costs; but as the appellant has made herself a party to the suit by voluntarily appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the Court in like manner as if she had been duly served with process."

The Supreme Court of Florida adopted in the case of Standley vs. Arnow, supra, the rule pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, saying:

> "This course has long been pursued by the Court of Appeals in Kentucky and the Supreme

> Court of Arkansas, and is adopted as a proper practice in like cases. *Vide* 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167."

Almost similar language is used by the Supreme Court of Florida as by the Supreme Court of Arkansas. Neither makes any distinction as to the character of the appeal, but holds that such appeal is voluntary.

In the case of Gilbreath vs. Kuykendall, 1 Pike, 50, it appeared that the writ was issued in the name of the United States and not of the State of Arkansas. The process was held void, but the Court in its opinion said:

> "But as the plaintiff in error has now made himself a party to the suit by voluntarily appearing and prosecuting his writ of error, according to the rule of practice in similar cases by the Court of Appeals of Kentucky, in which we fully concur, he must, upon return of the case to the court below, be considered as regularly before the Court in like manner as if he had been duly served with process."

In the case of Murphy vs. Williams, 1 Pike, 376, it appeared that the writ was returnable to the 1838 Term, while default was entered at the 1837 Term. The default was held error, but the Court at page 385 said:

> "But as the appellant has appeared here and assigned his errors, he has become a party to the proceedings and consequently Murphy, in accordance with the rule laid down in Gilbreath vs. Kuyendall, is bound to appear in the Circuit

> Court when the same proceedings will be had in this suit, as though he was served with a valid process."

In the case of Graves vs. Hughes, 4 Bibb 84, the Court found that Graves had not been served with process, but that service was made on another person by the name of Graves, and held that jurisdiction was not acquired to enter default. The Court said:

> "The decree as to Graves is therefore erroneous and must be reversed, the cause remanded to the court below and the order taking the bill as confessed against Graves set aside, and he may have leave to answer the bill should he apply for leave to do so; but if he should not apply for leave to answer, then, as by the laws now in force, a copy of the bill need not be delivered, and as he has appeared to the cause an order again may be entered taking the bill as confessed."

Judgment by default in ejectment upon void service, was reversed in the case of Wharton vs. Clay, 4 Bibb 167, but the appeal was also held to constitute an appearance, the Court saying:

> "The judgment must therefore be reversed with costs, and the cause remanded to the Court for new proceedings, but as the tenants in possession appear now to have notice of the pending of suit, unless they should appear and plead, judgment by default may be entered."

The rule announced in Standley vs. Arnow has been adhered to by the Supreme Court of Florida.

In Shrader vs. Shrader, 36 Fla., 502, on page 518, the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. Standley vs. Arnow, 13 Fla., 361."

In Wylly vs. Sanford Loan & Trust Co., 44 Fla., 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. Standley vs. Arnow, and Finlayson vs. Lipscomb, supra."

In Rumeli vs. City of Tampa, 48 Fla., 112, on page 114, the Court says:

> "The appeal of the defendant, Rumeli, operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. Wylly vs. Sanford Loan & Trust Co., 44 Fla. 818."

In the case of West Ind. Co. vs. Rupp., 235 U. S., 261, 59 L. ed. 220, at page 225 of the text, the Court said:

> "It does not appear that the Court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative

judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. Janley v. Donoghue, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398."

The above is similar to the case presented by the record herein; it does not appear that any Florida decision was called to the attention of the Circuit Court of Appeals, and said court cites no Florida decision, holding that an appeal from an interlocutory order of the court does not constitute a general appearance, as distinguished from an appeal from a final decree.

There is no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, on the merits as well as jurisdictional questions.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed

from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the State court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

> West Ind. Co. vs. Rupp, 225 U. S., 261, 59 L. ed. 220.
>
> Pennoyer vs. Neff, 95 U. S., 732, 24 L. ed. 522.
>
> York vs. Texas, 137 U. S. 15, 34 L. ed., 604.

The word "voluntary" has been defined by the Courts as, "done by design or intention; purposely; intentional; not accidental."

> Williams vs. United States Mutual Association, 31 N. Y. Supp. 343, 346; 82 Hun. 268.
>
> Travelers' Ins. Co. vs. Randolph, 78 Fed. 754, 762; 24 C. C. A. 305.
>
> Campbell vs. Fidelity & Casualty Co., 60 S. W. 492, 495; 109 Ky. 661.

The respondent in support of its construction of the word "voluntary" has cited in previous briefs

the cases of Craighead vs. Martin, 25 Minn., 41; Freer vs. White, 41 Mich., 74, 51 N. W. 807; and Pugh vs. Loisel, 219 Fed., 417, 424; to the effect that the effect of appearing to contest jurisdiction cannot be regarded as a voluntary appearance in the cause. This rule is true in Florida in so far as the original Court is concerned and is so specifically held in the case of Standley vs. Arnow, supra, where the Florida Supreme Court, speaking of the proceedings in the lower Court, stated:

> "But where a party appears and questions the jurisdiction by motion based upon an alleged defect of jurisdiction, it would be a violent presumption to say that he consents by objecting."

Yet, we have seen that the Supreme Court of Florida in that very case held that the taking of an appeal to the Supreme Court did constitute an appearance. Thus, the Court showed the distinction between the two proceedings, that of objecting to the jurisdiction in the lower Court and that of taking an appeal to the Supreme Court, and showed the different rules applying to the different proceedings, establishing conclusively that the prosecution of an appeal was a voluntary action constituting an appearance.

The appeal was voluntary. There was no process compelling appearance. There is no substantial difference between the instant case and the other cases decided by the Supreme Court of Florida.

Had no appeal been taken, the question could

very well have been raised in this suit in the District Court. But having appealed, *voluntarily,* in the State Court, respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, secure, if possible, the benefit of a binding adjudication in its favor *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. vs. Rupp, 235 U. S. 261, 59 L. ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

In the case of the Chicago Life Insurance Co. vs. Cherry, 244, U. S. 25-30, 61 L. ed. 966 (decided May 7th, 1917) at page 969, in its opinion the court says:

> "But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher

court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York v. Texas 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9, Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. Pennsylvania F. Ins. v. Gold Issue Min. & Mill Co. 243 U. S. 93, 96, ante, 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70."

In the case of Forsyth vs. Hammond, 166 U. S., 506-520, 41 L. Ed. 1095-1100, we quote: Headnote No. 5:

> "5. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the supreme court as res judicata, and cannot attack it collaterally in a circuit court of the United States."

In said case at page 1100, in its opinion the Court says:

> "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, a *res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript, p. 76). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 53).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript, pp. 5 and 6) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be administered through actions *in rem*. It is only the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol vs. Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible such as a debt, is essentially a proceeding *in rem:* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

The same principal is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted

> against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours).

The above language is taken almost verbatim from the opinion of this court in Wyman vs. U. S. 109, 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank. vs. Bleeker, 72 Minn., 383, 75 N. W., 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishee to the defendant."

The Supreme Court of the United States has passed on the questions as here involved in the case of Goodman vs. Niblack, 102 U. S. 556, 26 L. Ed. 229, decided subsequent to Pennoyer vs. Neff, 95

U. S. 714, 24 L. Ed. 572. In the Goodman case the defendant, Niblack, as administrator of an estate, had in his hands One Hundred and Fifty Thousand Dollars, ($150,000.00). The plaintiff had a judgment against the decedent for Thirty-one Thousand Three Hundred and Forty-four Dollars and forty-four cents ($31,344.44). A bill in chancery was brought to subject the funds in the hands of the administrator to the payment of the judgment, it being claimed that the money was a trust fund, devoted by the decedent to the payment of the judgment. The Court, in referring to the possible inability to obtain service on the trustees of the money, held that service by publication would bind them in so far as the decree entered affected the funds in the hands of the administrator, Niblack. It was said:

> "This is a proceeding in equity to force a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and that is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

The situation here is very similar. Instead of an administrator having custody of the funds in question, we have a Bank in possession of the money. In each case, a trust is sought to be impressed on

the funds for the benefit of the complainant. In each case the money is in the jurisdiction of the court, and the custodian of the money is before the court, personally served. No fundamental distinction can be observed, and the decision in the Goodman case, holding that the decree, insofar as it affected the funds, would be binding as to interested parties served by publication only, must be adhered to as controlling.

In Gamble vs. Dawson, 67 Washington, 72; 120 Pac. 1060; Ann. Cases 1913 D-501, an action in equity was brought against a resident corporation to have five thousand (5,000) of its shares of stock held by a non-resident defendant decreed to be the property of the complainants; to have such shares cancelled, and new ones issued to complainants; and to restrain the defendant corporation from transferring such shares of stock to any one but the complainants. It was held that the certificates of stock were mere *evidences* of property; that the property represented by such shares of stock was in the corporation which was in the jurisdiction of the court; that the court had jurisdiction, accordingly, over such property and its decree adjudicating the title thereto was valid.

To the same effect is Jellenik vs. Huron Copper Mining Company, 177 U. S. 1, 44 L. Ed. 647, which, as the court said in its opinion, was for the purpose of removing an incumbrance, or cloud on the title to certain shares of stock of a resident corporation. The shares were owned by non-resident defendants who were served by publication only. The opinion

is devoted mainly to the consideration of the question of whether the situs of the shares of stock was the residence of the corporation or the residence of the owner of the shares. It was held that the situs was the residence of the corporation, the corporation property being the property represented by the shares and certificates. Arriving at this conclusion, the court, without further discussion held that the court having jurisdiction over the property of the corporation could adjudicate the title to the shares of stock of the corporation.

That case is closely analogous to the instant case. In the suit referred to in defendant's (petitioner here) plea, (Transcript, p. 7) the property in question was in the jurisdiction of the court, although the certificate of deposit, or promise to pay over that property, which certificate of deposit was at most mere *evidence* of the money itself, was in another State. Under the holding in the Jellenik case, it was proper for the court to adjudicate and determine the title to the deposit, although the holder of the certificate was a non-resident and served by publication only.

In the case of Quarl vs. Abbett, 102 Ind. 233, 52 Am. Rep. 662, the essential facts were similar to those here involved. That was a suit against two non-resident defendants to declare void as fraudulent a transfer between them of certain shares of stock in a resident corporation. The property concerned, that of the corporation, was in the court's jurisdiction. Service on the non-residents was had by publication. It was held that the judgment set-

ting aside the transfer as fraudulent and subjecting it to the payment of complainant's demand, was valid, though based on constructive service of process on the non-resident claimants to the stock. We quote from the opinion:

> "It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able court, 'send his property within a jurisdiction different from where he resides he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' Clark v. Tarbell, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. Ames Iron Works v. Warren, 76 Ind. 512; Green v. Can. Buskirt, 7 Wall. 139; Rice v. Curtis, 32 Vt. 460. It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere empty legislative declaration, without either force or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the court would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which

appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a lien against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor if the rule were as asserted, could property of a non-resident corporation within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Judge Story says: 'Sometimes seizure or attachment is purely nominal, as for example of a chip, or a cane, or a hat. In other cases the seizure or attachment is bona fide of real property or personal property within the territory or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment.' Story Conf. Laws, para. 549. Wharton says: 'But when the thing is situate within the jurisdiction of the court, then proceedings in rem give a title to it against all the world.' Wharton Conf. Laws, para. 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites Ewer v. Coffin, 1 Cush. 23; Phelps v. Holker, 1 Dall. 261; Pawling v. Bird, 13 Johns 192; Arndt v. Arndt, 15 Ohio 33;

McVicker v. Beedy, 31 Maine 314; Bissell v. Briggs, 9 Mass. 462.

"It is said by appellant's counsel that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this cannot be true is too clear to admit of debate.

"The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. The principle is an ancient one, and even in the time when the contest between the chancery courts and the common law courts was hot and angry, it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy. Field v. Holzman, 93 Ind. 205; Carmichael v. Adams, 91 Ind. 526; 1 Pom. Eq. Jur. para. 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of indebted-

ness, for in almost every case the court must ascertain the indebtedness. Thus in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so in an action to enforce a claim against property fraudulently conveyed the amount of the debt must be ascertained, and so in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court in ascertaining the amount due does not proceed against the person but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and the decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case."

A case which cannot be distinguished from the one before this Honorable Court, is Loaiza vs. Superior Court for San Francisco, 85 Cal. 11, 9 L. R. A. 376. There, some real property situated in Mexico had been sold to the complainants, through false and fraudulent representations of the vendors who lived in Mexico. When the property was purchased, the complainants delivered certain moneys and securities to a stakeholder in California. The property sold was in Mexico, and the defendant vendors were in Mexico. Suit was brought in California, the residence of the stakeholder, and where were located the funds sought to be impressed with trust in favor of the complainant. Service on the

non-resident defendants, for whose benefit the stakeholder was holding the funds, was had by publication. It was held that as the property, title to which was to be adjudicated, was within the court's jurisdiction, judgment could be validly entered disposing of the property upon service by process by publication only on the non-resident claimants. In both that case and the instant case, personal property was involved. In both cases the property and the stakeholder were in the territorial jurisdiction of the court. In both cases the property concerned consisted of the purchase price for property sold through fraud. In both cases the defendants to whom the funds in question were payable, were non-residents, served by publication only. In both cases the relief sought was the same.

It was contended, in the Loaiza case, that because the defendants were non-residents, and not personally served, the court had no jurisdiction. In the course of the opinion, the California Court points out the error into which counsel for the non-resident defendants had fallen in the application of the case of Hart vs. Sansom, 110 U. S. 115; Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 572, and other cases relied on, and says: "But all this argument is based upon a misapprehension of the character and object of the action here under discussion and of the relation of the parties to each other at the commencement of the action." After reviewing a number of decisions of the United States Supreme Court, the opinion concludes:

"Even in the case of Arndt v. Griggs, 134

U. S. 316 (33 L. ed. 918), cited by petitioner, the court says: 'It (the state court) cannot bring the person of a non-resident within its limits,— its process goes not out beyond its borders * but it may determine the extent of his title to real estate within its limits and for the purpose of such determination may provide any reasonable method of imparting notice.'

"If the State Court had such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purposes of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our Statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civil Code, para. 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,— he who has become trustee by fraud,— by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded cestui que trust. That the court has such jurisdiction as is here claimed for it is fully sustained in Felch v. Hooper, 119 Mass. 52, where the case is clearly distinguished from that of Spurr v. Scoville, 57 Mass. 579, cited by petitioner; in National Exch. Bank v. Sterling,

> 31 S. C. 360; Quarl v. Abbott, 102 Ind. 233; in King v. Vance, 46 Ind. 251, where the court says: 'The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;' and in Martin v. Pond, 30 Fed. Rep. 15, where Mr. Justice Brewer says: 'It may be conceded that notice to the defendant is necessary to divest him of his rights and interest. But the publication is notice — it is equivalent to the personal service of summons.' "

Now in the proceedings relied on in defendant's additional pleas, (petitioner here), (Transcript, p. 7), the primary object of the suit was to determine the right of such non-resident defendants to a fund or deposit within the jurisdiction of the State Court, which fund or deposit, was created by such defendants by fraud, as the court held. Can it be declared to be the law that a person can come into the State of Florida, obtain money, or other personal property through fraud, leave the property within the State and within the jurisdiction of the State courts, go to a distant State, and be immune against any action in a court of equity to have his pretended ownership of the property adjudicated by the forum in which the property is situate and in which the fraud was perpetrated? Are State courts to be held powerless to protect their citizens in such circumstances? Is it to be said that citizens can be defrauded of their property, and that the courts must sit idly by, with that property in plain view, and within their reach, impotent to make restitution, because those who com-

mitted the fraud have stepped over the border line of the State? Such is not, never has and never could be, the law. With the property in its jurisdiction, the court by giving statutory notice, as was done here, can adjudicate title to the property and restore it to the proper owner, although of course its decrees can have no personal effect on the absent parties not personally served. Such is the law as stated in the cases heretofore cited in this brief, and such is the law if reasoned out on the basis of justice, practicability and common sense.

The principle that a court may adjudicate the title to personal property within its jurisdiction, although the owners or claimants of such property are non-residents and not personally served, has time and again been recognized and applied by the Supreme Court of the United States.

Chicago etc. R. R. v. Sturm, 174 U. S. 710, 43 L. ed. 1144.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023.

N. Y. L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140.

L. & N. R. R. v. Deer, 200 U. S. 176, 50 L. ed. 426.

B. & O. R. R. v. Hostetter, 240 U. S. 620, 60 L. ed. 829.

Amparo Mining Company vs. Fidelity Trust Company (N. J.) 71 At. 605, was an action in equity, brought in New Jersey by a New Jersey corporation, against a Pennsylvania corporation which was served

by publication only. The object of the bill was to establish title to 549,504 shares of stock belonging to the complainant, which the defendant claimed to own. The bill alleged that the defendant acquired the stock under such circumstances that it must be deemed to hold them in trust for the complainant. It was held that as the *res*, the stock, was in the court's jurisdiction, it could proceed to establish title thereto, notwithstanding the fact that the defendant owner thereof was a non-resident and not personally served. The opinion is exhaustive and instructive, reviewing thoroughly the authorities in point, and answering in detail all the possible objections that might be raised against the holding. The court stated that:

> "The authorities which control this court, indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it; (2) a course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res, in accordance with the mandate of the judgment or decree; (3) a course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action."

Then, after an interesting discussion too lengthy to be reproduced in this brief, the court continues:

> "In supporting the proposition that the present suit is strictly a suit in personam the brief for the defendant alleges 'that the object of the suit is to obtain relief which could only be decreed in personam' and points out that 'the prayer is specifically limited to a decree directing the defendant to transfer the shares of stock in question' and that 'the operation of the decree would be purely against the person of the defendant.' In support of these views it is alleged that 'the case differs from those in which decrees are sought to compel the conveyance of lands' in which cases by statute the 'decree if not complied with by the defendant can operate itself as a conveyance' and it is insisted that 'no similar provision is made for the transfer of property purely personal' such as the shares of stock in question. This argument seems to rest upon a mistaken view of the nature of the case set forth in the complainant's bill and of the relief therein prayed for, as well as an inadequate view of the power of the Court of Chancery to enforce its decrees affecting personal property which it can sieze and control. The allegations of the bill show that the stock in litigation is charged with a trust for the complainant's benefit, and that the complainant is the equitable owner of this stock, and that the defendant, as executor, etc., has no estate or interest therein, excepting so far as the same stands as security for the sum of $40,000. The prayer of the bill is that the rights under the trust above mentioned may be established by the decree of the court, as

well as that the defendant may be decreed to assign and transfer the said shares of stock to the complainant upon payment of the said sum of $40,000 with the interest thereon. Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust, a trust in respect to a res, situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its rights in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the State of Pennsylvania in order to secure such a surrender. A similar situation would exist if the defendant were a natural person resident in New Jersey who had been duly served with process in New Jersey, but who had gone out of the State, carrying with him the certificates representing the stock which was the subject-matter of the litigation. In such a case, however, the decree would be enforceable in personam, whenever the defendant could be seized within the state of New Jersey."

The opinion concludes in the following language:

> "My conclusion is, that the present action has all the essential characteristics of an action *quasi in rem*, and that the defendant, having been duly notified of the suit so as to give it ample opportunity to appear and make defense therein, will, if it refrains from appearing, be bound by the decree so far as the same relates to the status of the res, and that in such case the defendant cannot maintain that it is deprived of property without due process of law."

The foregoing decision was affirmed by the New Jersey Court of Errors and Appeals, 73 Atl. 249.

In Gassert vs. Strong (Mont.) 98 Pac. 497, the question raised by this writ of error was squarely before the court. It was there expressly stated that an action to establish and enforce a trust in personal property fraudulently obtained is an action *in rem*, and even though the defendants holding the legal title are non-residents and served by publication only, yet the court has jurisdiction to declare and enforce a trust against them because the subject matter of the trust is within the territorial jurisdiction of the court. The opinion, after pointing out that the fact that the action was in form against the non-resident defendants personally was immaterial, and after reviewing the decisions of the United States Supreme Court already presented in this brief, said:

> "It has been quite generally held that an action to establish and enforce a trust in real estate is a proceeding quasi in rem (Porter Land & Water Co. v. Baskin (C.C.), 43 Fed. 323; Reeves, v. Pierce, 64 Kan. 502, 67 Pac.

1108), and that 'the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust so far as the property within their jurisdiction is concerned.' 22 Ency. Pl. & Pr. 21. And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. Pennington v. Smith (C. C.) 69 Fed. 188."

Then after quoting from Loaiza vs. Superior Court (Cal.) 9 L. R. A. 376, quoted supra, the Court continued:

"From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless to enforce such trust, merely because one of the parties holding the legal title thereto is beyond the reach of the process of such courts. We think it sufficient to give the court jurisdiction that either the party or the subject-matter of the trust is within the reach of the court. And this appears to be the holding of the courts, Felch v. Hooper, 119 Mass. 52.

"To what class of actions, then did section 610 above, before the amendment of 1907 apply? In the language of the Supreme Court, in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, we think 'it applies to all cases where under recognized principles of law suits may be instituted against non-resident defendants.' That it was so intended we think is obvious from the general terms in which the section is couched; and, so far as we know the only exception which can be made from the operation of its provisions is in actions in

personam, strictly speaking. We are of the opinion that the present action is not such a one, but that it falls within the definition of a proceeding quasi in rem, and that substituted services upon L. M. Strong was sufficient to enable the district court to determine the relative rights of the parties to the stock in question, even though it would not be sufficient to warrant a personal judgment against L. M. Strong himself."

Cases to the same effect might be cited ad infinitum but we have already presented sufficient to reveal the unanimity of judicial opinion on the points in question. It cannot possibly, in view of the many cases cited supra, be contended that the proceedings in the State court were not proceedings *in rem*. The fact that the certificates of deposit were in Georgia is immaterial. They were mere evidences of the deposits, which were in the Jasper Bank. These deposits consisted, it appears from the copies of the bills of complaint attached to the replications (Transcript, pp. 35 to 41), of the proceeds of promissory notes given by the complainants in those suits to the respondent here, and by it delivered to the Jasper Bank, this petitioner. The notes were at all times outstanding and constituted the *res* which was the subject matter of the suits in the State court. And even if we disregard the presence of the notes, and consider the case as merely one of a general deposit, evidenced by certificates of deposit, the *res* would still be in Florida, at the Jasper Bank, being the indebtedness of it to the respondent here. A debt has

often been held to be a *res*, such as will support an action *in rem* against it, and its situs for the purpose of administration, is considered to be at the home of the debtor. In the present case, the debtor, Jasper Bank, being within the jurisdiction of the State Court, the debt, the *res*, was also in the jurisdiction.

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I & P. R. Co. vs. Sturm, 174 U. S. 710; 43 L. ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

> "To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process, and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, it cannot be contended that in the suits in the State Courts, there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida, the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent, or anyone for it.

The holding in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

A very similar case to the case at bar is that of Pennington v. Fourth National Bank, 243 U. S. 269-273; 61 L. Ed. 713, (decided March 6, 1917). In said case Mrs. Pennington brought a suit for divorce, in a State court of Ohio, against her husband, who was a non-resident of Ohio, who was served with process by publication only, and had not voluntarily appeared in the suit. She obtained a valid decree of divorce. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the Bank from paying out any part of the deposit. Under later orders of the Court, the Bank made payment from it to the wife. Finally it was perpetually enjoined from making any payments to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment. Payment of the check was refused. Thereupon, Pennington

brought in another State court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was taken to the Supreme Court of the United States for review, Pennington still claiming that his constitutional rights had been violated.

In the above case and the case at bar service by publication was had on the non-resident defendants. In both cases a resident bank, holding the funds of a non-resident defendant, was made a defendant and personally served with process. In both cases the defendant bank was enjoined from paying the money to the defendant in whose name the funds were deposited, and was ordered to pay said deposit to the plaintiff. In both cases the deposit in the resident bank, defendant, the debt due the non-resident defendant, was the res adjudicated by the State court. Said deposit was property within the State and in the jurisdiction of the State Court. In both cases the situs of the debt or res is the residence of the defendant, the resident bank. In both cases personal property was involved. In both cases the original suit was by bill in chancery in which the State court entered final decree, in which the resident bank defendant was enjoined from paying the money to the non-resident defendant in whose name the funds were deposited, and was ordered to pay said deposit to plaintiff. Thereafter in both cases,

the original non-resident defendant, brought an independent action in another court against the original resident bank, defendant, for the amount of the deposit. Finally, in both cases the entire matter was taken to the Supreme Court of the United States for review.

In the above case, Pennington vs. Fourth Nat. Bank, 243 U. S. 269-273, 61 L. Ed. 713, at page 714, in its opinion the court says:

> "The 14th Amendment did not, in guaranteying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example is property within the state. Chicago R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. cases 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

"It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, in choate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, that is, it will be valid not in personam, but as a charge to be satisfied out of any property seized. Cases are cited in the margin.

"The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the cus-

tomary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which can not be attached at law. Cases are cited in the margin.

"Affirmed."

In accordance with the above opinion we maintain that defendant's (petitioner here) two additional pleas, with exhibits attached (Transcript, pp. 7 to 11 and pp. 11 to 17) to first two counts of plaintiff's (respondent here) declaration (Transcript, pp. 3 to 6) are a complete defense to respondent's cause of action.

We wish to call the attention of this Court to the decision of the Florida Supreme Court in the case of Rome Ins. Co. vs. Corbett, 63 So. 833 (Transcript, pp. 53 and 54). In that case the same points are involved as are presented by the writ of error to the United States Circuit Court of Appeals. In fact said writ of error amounts in effect to an appeal from the Supreme Court of Florida to said Circuit Court of Appeals, for it is the decision in Rome Ins. Co. vs. Corbett, of which the respondent here really complains. The Court there said:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-resident corporations, seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute, was had by publication, and the non-resident corporation ap-

peared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

and,

"The bill *confines its prayer to an adjudication of the fund sought to be impounded*, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived, to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts, and as has been said in Kilpatrick v. Post, 53 N. J. Eq. 591, 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says, 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this

question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The order is affirmed." (Italics ours).

The foregoing decision was an adjudication by the Florida Supreme Court that the court, in the proceedings set up in the additional pleas herein, had jurisdiction in the premises. Therefore, under the rule as laid down in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, this Court should give "full faith and credit" to the decree.

The theory on which the respondent attacks the validity of the decree set up in the plea in question, is fallacious and unsound, unsupported by reason, justice or authority. This theory is, that according to one of the twelve maxims, equity acts in personam; that the decree set up in the plea is a chancery decree; that, therefore, it must be a personal decree and consequently void for want of personal service. Counsel for respondent contends that in the absence of the statute, equity can only act *in personam* and that no statute in Florida exists authorizing the decree under consideration.

The major premise of respondent's syllogism,

viz, that equity acts only in personam, is unsound and its conclusion must necessarily fall with it.

The many cases already cited in this brief in themselves constitute an unanswerable refutation of this theory. They show that equity does act *in rem* in so far as is necessary to justify service by publication. The maxim, "Equity acts only *in personam*, and not *in rem*," is not to be taken too literally. It was a statement made at the time when Chancery jurisdiction was first exercised to allay the jealousy of the common law courts, which feared the usurpation of their powers by the Chancellors. The maxim stated that equity would act *in personam*, on the consciences of the parties, and thus perform a duty impossible for the courts of law to fulfill. However, it was seen, from the necessities of the case, that equity could not act entirely *in personam*, and although the maxim was retained, and still applies, in a limited sense, yet equity decrees are in a large part, *in rem* and not *in personam*. This is pointed out by all the recognized authorities on equity jurisprudence.

We quote from Vol. 1, Pomeroy's Equity Jurisprudence, (3rd Ed.) Sec. 134-135, as follows:

> "Some writers have argued that the equitable jurisdiction is to be regarded as wholly remedial, and that equity itself does not create any rights of property or other primary rights, because the Courts of Chancery, as they say, only act in personam against the parties and never in rem upon the subject matter of a judicial controversy. It is said that a decree of the court never operates by virtue of its own in-

herent efficacy to create or to transfer an estate, right or interest; that such decree never executes itself nor furnishes any means or instrument by which it may be executed without the intervention or act of the party against whom it is rendered; that the plaintiff in equity never merely by means of the decree in his favor ever recovers possession of the land or *other subject matter*, or becomes invested with the title to or estate therein; and that the court simply orders some act to be done, a conveyance to be executed, an instrument to be surrendered up and cancelled, possession to be delivered and the like, and then merely uses a moral coercion upon the defendant by means of fine and imprisonment to compel *him* to do what is asked to be done in the judgment. This radical difference between the effect of the decree in equity and a judgment at law, it is urged, shows that there are no equitable primary rights, no equitable estates or interests distinct and separate from the rights to obtain such remedies as are administered by the Court of Chancery."

After giving the views of some writers in the language above quoted, the same author (Pomeroy) comments on the view as follows:

"There may be some plausibility in this argument on its surface, but when it is examined with care and under the light of history, all its force disappears. The early Chancellors from prudential motives alone and to avoid a direct conflict with the common law courts, adopted this method of acting, as they said upon the consciences of defendants; and the prac-

tice which they invented has with the English national devotion to established forms, continued to modern times. *But it is certainly a complete confounding of the essential facts with the external form to say that such a method of procedure, adopted solely from considerations of policy, determines the nature of the equity jurisdiction and demonstrates the non-existence of any equitable primary rights, estates and interests.* (Italics ours). If there has been any *necessary* connection between the proceedings and remedies of the Chancery and this mode of enforcing its decrees in personam, if it had been intrinsically impossible to render these decrees operative in rem, then the argument would have had some weight but in fact there is no such connection, no such impossibility, and the decrees of the court of equity may be made to operate in rem to the same extent and in the same manner as judgments at law."

Up to this point in the statement of the law by Mr. Pomeroy, no reference is made to any statutory enlargement of equity jurisdiction. However, he follows the statement just quoted with the further statement, as follows:

> "Furthermore, whatever of plausibility there might be in the theory as applied to the English Court of Chancery has been entirely destroyed by the legislation of this Country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the persona of a party, etc."

It is clear, however, from Mr. Pomeroy's exposition as above quoted, that regardless of any statutory enlargement of equity jurisdiction, equity does in fact act *in rem*, as well as *in personam*.

We quote again from Section 429, page 710, Volume 1 Pomeroy, as follows:

> "*In what sense equitable remedies do operate in rem:* It has also been shown when explaining the nature of equitable remedies that they generally are in another special sense essentially in rem and not in personam. Equitable remedies very seldom consist of personal judgments, general recoveries payable out of defendant's assets. The fundamental theory of the remedial action of equity is, that it deals with specific and identified land or *chattels* or *specific funds*, whether consisting of securities and other things in action or of money and it seeks to determine, declare and maintain the estates, interests and rights of the litigant parties in and to such identified lands, chattels, or funds."

In the third edition by the same author in Volume 1, at page 196, it is stated:

> "The maxim referred to (that equity acts only in personam) has therefore a very limited application. When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak, internal nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinct and central principles of the equity remedial system that it deals

with property rights—estates, interests, liens,—rather than with mere personal rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of property, in their various grades, from complete estates to liens or charges is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,—things to be acquired in the future—the remedial right is worked out by conceiving of a present ownership, interest, lien or charge arising from the executory provisions or a present possibility which will ripen into such an interest, and by establishing this proprietory right, protecting and enforcing it."

And continuing on in the same section, the author clearly demonstrates that equity in a peculiar way deals with rights or interests in property and shapes its relief accordingly without much regard to the personal rights of the plaintiff and the personal obligations of the defendant—or rather by passing over them in its decree.

In Bispham on Equity, the author, after setting forth the maxim that equity acts *in personam*, points out the limitations on its application, and expressly states that equity acts *in rem* where the *res* is in the jurisdiction of the court although the defendant is a non-resident and personal service on him is impossible. At page 75 it is said:

"The maxim that a court of equity acts in personam must not be understood to mean that

the jurisdiction of the chancellor extends to rights of action for personal injuries. The reverse is the case. The subject of the jurisdiction of courts of equity is *property*—not *persons*. Their process is directed against persons and sometimes against property; but there must be some right of property involved in order that the jurisdiction of the court may attach. This subject will be noticed hereafter; but reference may be made in this connection, to the refusal of courts of chancery to entertain any bill to recover damages for purely personal torts.

"It may not be out of place, moreover, to mention here the rule applicable when the res happens to be within the jurisdiction, and the person whose rights in the res are sought to be affected by the decree is a non-resident. In such cases, at all events for certain purposes, the court will exercise jurisdiction over the thing although personal service upon the defendant may not be possible—whenever service by publication, in lieu of personal service, is authorized by statute. Cases not infrequently arise where it is necessary that the title to real estate should be perfected by getting rid of an outstanding claim. The title to land may be clouded by the existence of an alleged right which the holder declines, presently, to assert. There is, as we shall see hereafter, a jurisdiction in courts of chancery to remove a 'cloud' upon the title. This power may be exercised if the land is within the process of the court, although the party affected may be beyond its limits."

The theory advanced by counsel for plaintiff

(respondent here), that equity can act only *in personam;* that consequently it cannot enter a decree *in rem* which can be based on service by publication, is not original. It has many times, in similar cases been offered to the Courts, but in each instance it has met with a cold reception. In Amparo Mining Co. vs. Fid. Trust Co. (N. J.) 71 At. 605, heretofore quoted, the court disposed of the theory as follows:

> "In the present case the res is personal property. It does not follow that because anciently an equity decree affecting real estate operated only in personam, and did not proprio vigore transfer or establish title, that such decrees affecting personal property within the jurisdiction of the court were in the same way limited in their practical operation. Assuming that formerly in neither case did the decree establish title but only the right of the complainant to receive a title, the important distinction still remains that in the case of real estate title did not pass upon delivery of possession, whereas in the case of chattel property it did. Anciently the Court of Chancery would not give to a successful complainant, in a suit for specific performance of a contract to convey real estate, a writ of assistance to put him in possession, because no legal title would be thereby established. The same difficulty does not exist in the case of chattels. The argument to sustain the plea in this case seems to assume that a party complainant, who has obtained a final decree in this court establishing his equitable title to chattels in possession of a defendant holding legal title thereto, and who in pursuance of such decree has actually obtained

possession, has no legal title, and will have none until the defendant has voluntarily, or under the compulsion of the court, executed a conveyance. The general principle, I think is now recognized that a bare legal title to chattels cease to exist when the holder of a complete equitable title takes possession for the reason that such possession creates a legal title. Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819 (1904). Such certainly must be the effect of the union of a complete equitable title and possession, when the only right or duty in respect of the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title. Possession of a chattel under a complete equitable title in such a case must make a complete legal title."

There can be no question of the jurisdiction of courts of Chancery over proceedings such as are disclosed in the pleas under consideration. The cases cited herein where similar decrees have been entered and upheld, amply substantiate this proposition. Equity having jurisdiction as the authorities all show, to declare the trust and adjudicate the title to the funds involved, the State had the power to provide for substituted service against non-residents by publication. The Florida Statute concerning service by publication (Gen. Stat. 1866) (Rev. Gen. Stat. 3111; year 1920) is unlimited. It provides for service by publication in all chancery cases. On page 53 of the Transcript we see that the Florida Supreme Court in Rome Insurance Co. vs. Corbett,

63 So. 833, construed this, its own statute, as follows:

> "Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts."

It is not material to quote the entire section here, as it deals with the mechanism of obtaining service by publication. It commences:

> "Whenever the complainant, his agent or attorney, shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a state or country other than this state—"

and continues to describe the process of mailing, posting, publishing, etc. The word "whenever" is the only limitation on the operation of the section, and as we have seen, the Florida Supreme Court has held it broad enough to cover any equity action. So has the United States Circuit Court for the Southern District of Florida. In Morris vs. Graham, 51 Fed. 53, the court said:

> "The general principle of equity gives to the courts of this state powers to investigate questions of cloud of title, with power to quiet the title to lands involved and to remove therefrom alleged liens, and no special statute was required for that purpose. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495. The state has by statute authorized and provided for publication and service to carry into effect the rights before existing in a court of chancery."

So in this case. The courts of equity have power to investigate fraud, establish and enforce trusts, without any special statutory enactment for that purpose. The State, by its constructive service statute (Gen. Stat. 1866 supra) (Rev. Gen. Stat. 3111; year 1920) has authorized service by publication to carry into effect the rights and powers of its Chancery courts.

The Supreme Court of the United States has passed upon this contention in Arndt vs. Griggs, 134 U. S. 316, 33 L. ed. 918, which concerned the powers of a Chancery Court to clear title to land within its jurisdiction when the defendant was a non-resident served by publication. It was held that the State has control over the property within its borders and could provide, as by service by publication, reasonable methods of imparting notice to non-residents. The Court said:

> "The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.
>
> "While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is. What jurisdiction has a State over to titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the

> claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

To the same effect is Grannis vs. Ordean, 234 U. S. 385, 58 L. ed. 1363.

In these two cases the property concerned was real estate, but the reasoning of the opinions applies equally well to personal property. The State has undoubted jurisdiction over property within its borders. Its courts of equity have equally undoubted jurisdiction to establish and enforce trusts and to relieve from fraud. Therefore a decree establishing and enforcing a trust resulting because of

a fraud, in personal property within its jurisdiction is valid even though non-residents claim title to such property, if, as in this case, proper notice by publication is given, as provided by statute. Every authority and every case cited in this brief refutes the theories of counsel for plaintiff and shows beyond question that the decree set up in the plea under consideration is valid.

In Rothschild vs. Knight, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King vs. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours).

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript, p. 74):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which

the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Forida. They, in themselves constituted the *res*. But in addition there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript p. 76), the certificates of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness, which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to the respondent. This is essentially the theory of garnishment. The situs of the debt being at the home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but

they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 565.

Freeman vs. Alderson, 119 U. S. 185, 30 L. ed. 375.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D—THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 7 to 17). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 72 to 75); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 75 to 77).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeal's decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the question of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript, p. 17) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote vs. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance and is not a compliance with the statute requiring the substantial matters of law to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 21 to 57) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it is said:

> "Only objections or grounds of objection urged in the trial court will be considered on

appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not." (Italics ours).

In the case of Belk vs. Meagher, 104 U. S. 279, 26 L. ed. 735-739, at page 739, the Court said:

> "Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it."

As this Court said in Robinson & Co. vs. Belt, 187 U. S. 41, 47 L. ed. 65:

> "*While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to try these cases de novo.*"

An examination of the transcript of the record in the cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect, as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

In the case of Wood vs. Weimar, 104 U. S. 786, 26 L. ed. 779-782, at page 782, the court said:

> "The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

In the case of Bort vs. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 538, decided by the United States Circuit Court of Appeals for the Eighth Circuit, the court in effect holds:

> "A writ of error presents for review nothing but the alleged errors of law into which the court below has fallen, and a contention which was never presented to nor ruled upon by that court is not before the appellate court for consideration or decision."

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 7 to 17) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees. It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees if valid, and only asked that Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds—in other words the amounts of the certificates to American Bank and Trust Company, *or to anyone for it*, (Transcript, pp. 11 to 17). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument—on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript, p. 76). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudge the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts

represented by the certificates consisted of the proceeds of the note, and if a part of the amount consisted of other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript, pp. 7 to 17) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript, pp. 21 to 57) do not say that the certificates only partially cover the proceeds of the notes. They are concerned only with the jurisdiction of the Court in entering decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could, therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We believe that it has been clearly demonstrated that the Circuit Court of Appeals erred in its decision of this case, and that the decree of the District Court was proper, the latter being in consonance with the decision of the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendant was not necessary.

2. The prosecution of an appeal under the Florida practice constitutes a general appearance.

3. The State Court had jurisdiction over the person of the respondent by reason of its voluntarily availing itself of the State Court's jurisdiction to prosecute appeals therein.

4. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

5. The effect of the State Court's decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

We submit that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed; and that the judgment of the United States District Court for the Southern District of Florida should be sustained.

Respectfully submitted,

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